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No. _____

*IN THE*

*SUPREME COURT OF THE UNITED STATES*

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OCTOBER TERM, 1997

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In Re: Joseph Smith & Sons, Inc., Debtor.

FRED G. ZEHNER,

Petitioner,

v.

ROBERT PAUL SMITH, ET AL

Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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96 pp

## QUESTION(S) PRESENTED

I. SPECIAL CASE & STRICT LIABILITY

The proceedings in this matter have so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the lower court, as to call for an exercise of this Court's supervisory power. All parties involved are in the business of recycling and shipping/disposal of dangerous, toxic and hazardous materials. Because the handling of toxic hazardous waste is involved, strict liability is an issue where utmost care is required because of the great risk to the public.

II. ABUSE OF PROCESS

A. Did the U.S. Court of Appeals for the Fourth Circuit err in its determination that the facts material to resolution of this appeal are not in dispute?

B. Did the U.S. Court of Appeals for the Fourth Circuit err in its determination that the Appellant failed to meet his burden of proof supporting his claim as to abuse of process?

III. DENIAL OF DUE PROCESS

A. Did the Judge err in his determination to conclude the bankruptcy hearing prior to allowing the testimony of all witnesses and experts present as indicated by counsel would be called at such hearing, thereby denying Appellant due process?

B. Was the appellant denied due process by the fact that: (i) he has been and continues to be denied a copy of the tape of the bankruptcy hearing, even though the Fourth Circuit made

their hearing tapes available immediately without question, yet bankruptcy court continues to refuse tapes, and (ii) that the court record has been altered in a major way?

C. Was the appellant denied due process by the fact that he lost his jury trial because of Smith and his attorney's clear perjury to the trial court to delay this case until Smith found a vehicle to evade the set jury trial?

IV. PERJURY/FRAUD UPON THE COURT

A. Did the Judge err when he referred to Appellant's lack of pursuit of discovery sanctions remedies at the lower court level, when the record clearly reflects such remedies were in fact pursued by Appellant?

B. Did the Trial Court err in its determination to deny appellant's requests for discovery sanctions for Appellee's refusal to cooperate with discovery based upon Appellee's perjury and fraud upon the court by falsely indicating that the all important non-existing documents had been provided to Appellant?

V. UNCLEAN HANDS

A. Did the court err in its decision in not finding against the Appellee based upon the doctrine of unclean hands, in that there was fraud in the possession of Smith's main witness false manufactured evidence dated 47 days before the lawsuit was filed and that Appellee was dismissed from a mutual business association for attempting to involve Appellant Zehner in a mutually beneficial and illegal enterprise?

## LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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Beaver Heights, MD 20743

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## OTHER

None

No. _____

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ROBERT PAUL SMITH, ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished. The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

## JURISDICTION

The date on which the United States Court of Appeals decided by case was August 5, 1997. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 17, 1997, and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE CONSTITUTION OF THE UNITED STATES OF AMERICA, Amendment V

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be ... **deprived of life, liberty, or property, without due process of law** ...

THE CONSTITUTION OF THE UNITED STATES OF AMERICA, Amendment VII

The Seventh Amendment of the United States Constitution provides in pertinent part:

> **In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ...**

THE CONSTITUTION OF THE UNITED STATES OF AMERICA, Amendment XIV, Section 1

Section 1 of the Fourteenth Amendment of the United States Constitution provides in pertinent part:

> Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....**

## STATEMENT OF THE CASE

### I. BACKGROUND

Petitioner, Fred G. Zehner (hereinafter referred to as "Zehner"), has incurred substantial damages as a result of the lawsuit initiated against him by Respondents, Joseph Smith & Sons, Inc. and Paul Smith (hereinafter referred to as "Smith"), and his attempts to defend the same. The initial Complaint was filed in the Circuit Court for Prince George's County, Maryland (hereinafter referred to as "trial court") on June 8, 1992. The parties in this case are involved in various aspects of the recycling and disposal of toxic hazardous waste business, where strict liability applies. See Appendix E for an EPA Project Summary containing further information regarding polychlorinated biphenyls (PCBs), etc.

Fred G. Zehner is a permanently disabled Korean War Veteran, a life-long resident of the State of Maryland, and an outstanding and recognized man in his community. Mr. Zehner has received numerous awards for business and farming, has an untainted reputation, and was considered a "pillar of the community."

Contaminated Soil Consultants, Inc. (hereinafter referred to as "CSCI"), begun in 1991 by Fred G. Zehner, was a full service recycling company with four divisions (including fluff, contaminated earth, pump and tank, and an asphalt and environmental assessment division). CSCI was operated by Fred Zehner for the benefit of the public, in that Zehner took nothing as owner from CSCI for running the business, even when the company was showing substantial profit. Zehner was the owner, sole stockholder and holder of all offices of the corporation. CSCI's purpose was to dispose of fluff at the lowest possible cost, and help clean up the environment as and when needed in numerous fields, as to EPA specifications so that Zehner's fellow man did not have to live with toxic hazardous waste and out of harm's way.

Fluff, a by-product of recycling, is a hazardous waste product with up to 760 parts per million ("ppm") PCB's. See the EPA Project Summary (App. E) where the conclusion states that "PCB concentrations in fluff ranged from 0.67 to 760 ppm" (**over 15 times the allowable limit**). Per government specifications, over 50 ppm is hazardous, including other extremely hazardous substances, such as **lead, cadmium, arsenic, chromium, elevated levels of hydrocarbons (petroleum), PCBs, and many others, placing it under the EPA strict liability laws.**

In his lawsuit, Smith **knowingly** referred to a certain PCB test with test results of **"700 parts per million"** rather than **"700 parts per billion,"** as the test result showed and as discussed in the deposition testimony of Joseph Smith. **During his deposition, Smith admitted that the test he had referred to in his lawsuit was only .7 parts per million PCBs**, and was not harmful to Joseph Smith & Son, nor was it hazardous as he had claimed with over 50 parts per million when it becomes hazardous. (App. K). Therefore, **the whole basis for his lawsuit never existed.**

From January 1991 until November 1991, CSCI had Smith's fluff approved as requested by Smith into CSCI air space at Browning-Ferris Industries, a cooperative business arrangement. **That is where the 700 parts per billion honest PCB test originated**. However, Smith falsely stated the test to be 700 "parts per **million"** (or 1,000 times larger) rather than "parts per **billion"** to knowingly destroy his competitor, Zehner. **Smith knew that the "700 ppm" test did not exist**, as evidenced by his own deposition testimony. (App. K).

In November 1991, Zehner terminated his business agreement with Smith because Smith tried to get Zehner into an illegal deal involving contaminated tanks which would have allowed hazardous materials into Smith's plant, where fluff was being generated, thereby violating his approval agreement as to the quality of the fluff. This action **changed Smith and CSCI from cooperators into direct competitors**. Subsequently, CSCI (directly and through other recyclers such as Davis and Conservit) outbid Smith and was awarded landfill site contracts, thereby confirming that CSCI/Zehner were direct competitors with Smith (the first element of abuse of process).

**But Smith still pressed the lawsuit for thirty-five (35) months while Zehner vigorously fought to defend CSCI.** Smith refused to respond to discovery and continued to press the case by perverted means such as repeated perjury and fraud upon the court by and through his officer of the court, attorney Wyrough.

## II. HISTORY OF CASE

### A. Circuit Court for P.G. County, Maryland

On June 8, 1992, Smith **recklessly** (because in his deposition he clearly admitted that he misread the PCB test which is the basis for this lawsuit) filed suit in the Circuit Court for Prince George's County, Maryland against Fred Zehner (hereinafter referred to as "Zehner") and numerous other defendants, claiming multi-billion dollar ($4,550,000,000) damages resulting from alleged acts of conspiracy, fraud, loss of business, etc. by Zehner and the other defendants in the Complaint (which was introduced as evidence and in which **Smith stated 30 times that he was a competitor of Zehner**). The Complaint contained **numerous 100% false statements and allegations**. Smith has continually and consistently committed perjury and fraud upon the court, as is clearly documented in this case. Even while he was pressing the false charges against Zehner, Smith was **covertly shipping hazardous PCB capacitors out of his plant through third parties**, which in his Complaint he **certified** to the court he does not take into his facility. **This is clear fraud upon the court.** Smith, in his answers to interrogatories, admitted he had **lost no customers or business**, despite his active pursuit of this $4.5 billion lawsuit against Zehner and others. As a result of Smith's

fraudulent use of the legal system, this case was dragged out over a period 35 months. Discovery has never been completed. **The trial court specially set the case for a two-week jury trial, which was reduced to a two-hour hearing in Bankruptcy Court.** Zehner has been repeatedly **denied due process** as a direct result of Smith's perjury and fraud upon the court to delay this case.

Smith and his counsel completely frustrated the discovery process by refusing to file answers to interrogatories and refusing to produce requested documents. Smith and his counsel went so far as to misrepresent to the court that documents that **do not even exist** had been provided to Zehner **under oath**, when in fact, no documents were provided.

Zehner filed Interrogatories requiring Smith to file answers with documents, and supplement those responses if necessary. On September 28, 1992, Smith filed a motion requesting a time extension of thirty (30) days to respond to discovery. Zehner objected and opposed Smith's motion because Zehner was incurring substantial daily personal and business damages. On October 28, 1992, an Order was issued granting Smith's Motion and ordering Smith to respond to Zehner's discovery by or before November 12, 1992. The Court awarded **only** an additional fifteen (15) days to respond, due to the objections of Zehner based upon the substantial daily damages being incurred by Zehner and his business. Smith's extended response time elapsed, but again no answers were filed and the documents were not produced. **At this point, the case would have been dismissed, sanctions granted, and the lawsuit, if Smith had not committed perjury to the court.**

On January 4, 1993, Zehner filed a motion for sanctions (with appropriate affidavit and exhibits), again advising the court of Smith's repeated failures to respond to discovery. On January 18, 1993, Smith and his attorney filed an opposition to Zehner's motion for sanctions stating that the requested **discovery had been provided to Zehner**, and therefore the request for sanctions was moot. On January 25, 1993, Zehner's motion for sanctions was denied by Judge Martin, based upon **the perjury** and **fraudulent representations** of Smith and his attorney (Wyrough) to the court **under oath** that the requested discovery **had been provided**, thereby perverting the legal system after the filing, which surely provides the **second element of abuse of process after filing**. On March 26, 1993, Zehner again filed a motion to compel discovery. (App. J).

There was a hearing before Judge Missouri on June 11, 1993, at which time Smith and his attorney admitted that they **had not provided** any of the twelve (12) requested documents to Zehner, which proves beyond any doubt that Smith committed **perjury** before Judge Martin and in his Answers to Interrogatories signed under oath, which caused Zehner's sanctions to be denied. After prior statements under oath to Judge Martin at the first sanctions hearing that the requested documents **had been provided**, now in front of Judge Missouri, Smith and his attorneys stated to Judge Missouri at the second sanctions hearing that the requested documents were privileged because they involved customer lists and trade secrets, **which was not true**; they further stated that Smith and Zehner were "**serious competitors**" and, therefore, Zehner was not entitled to the requested documents, which **again** clearly proves the **first element of abuse of process by Smith's own testimony, i.e. competition**. (App. I). **None** of the interrogatory questions or documents requested involved

**customer lists or trade secrets**, so the court was again **deceived by the perjury and fraud upon the court** by Smith and his attorneys, and Zehner was again denied appropriate sanctions. **This again is the second element of abuse of process**, i.e. perverting the legal process after filing. Because of the known false claims of Smith, Judge Missouri made no ruling at that hearing because **Smith again falsely stated** he would furnish the requested documents, which were to include the 700 ppm PCB test in response to Interrogatory No. 14 **(which he clearly knew did not exist)**. (App. K). The fictitious PCB test fabricated by Smith is the basis of his Complaint and this whole case. **This again proves the second element of abuse of process**, i.e. perverting the legal process after filing.

**On September 30, 1993**, a Scheduling Order was issued by the court requiring that discovery be complete by April 1, 1994 and that the trial was **specially set for two weeks before Judge Salmon to begin on September 26, 1994**. (App. J).

On June 9, 1994, Smith filed a Suggestion of Bankruptcy, thereby staying all pending litigation in the trial court. (App. J). Smith was able to find yet another means to further delay proceedings in this case. **After constant delays due to his perjury, Smith used bankruptcy court as a vehicle to escape the jury trial** and the ultimate outcome that obviously would have been in favor of Zehner. Just prior to Smith's filing bankruptcy, Smith was found liable for an award of approximately $5 million by a jury in a similar trial in the same jurisdiction (his reason for filing bankruptcy).

When he got to bankruptcy court, **Smith dropped** his suit before the hearing so Zehner **did not have** the chance to challenge Smith's witness and prove Smith's case one hundred percent (100%) false. **Smith has been constantly and falsely demonizing his innocent opponent for exactly what he himself has actually been doing, and using the courts to do so.** This is clearly one hundred percent (100%) **documented**.

**B. Bankruptcy Court**

On September 8, 1994, Zehner filed a Proof of Claim (with numerous supporting documents attached) with the United States Bankruptcy Court. A hearing was held on October 17 and 18, 1997 before Judge Schiff, **sitting by designation** who, therefore, was not familiar with the case. Judge Schiff stated that the case was "bare bones, with no attachments" despite the fact that the record reflects supporting documents were attached when the Proof of Claim was filed, and **a hearing was held over Smith's objection and the Proof of Claim was submitted as ordered by Judge Kier**. Also, the transfer documents from trial court to bankruptcy court (requested and submitted by Smith) were not provided, which included: **trial court docket**, Complaint, and co-defendant Davis' **Fourth Affirmative Defense** (which stated that Smith filed with unclean hands). Judge Schiff indicated that the Clerk was getting him the claim file, but did not wait for it before proceeding. Judge Schiff stated that he had reviewed the original Complaint and immediately proceeded with the hearing without having reviewed the claim file or other extremely relevant documents, such as the **trial court docket**, the Davis answer to complaint (defense of unclean hands) and the Taylor deposition. Both testimony and documentation in this case provide overwhelming uncontested

prima facie evidence to prove Zehner's claim, but this evidence was totally ignored by Judge Schiff because he did not review all pertinent documents and, therefore, did not fully understand the issues at hand.

The case docket, original complaint, amended complaint, answers (including the Davis answer with unclean hands defense), deposition of William Taylor, interrogatories, answers to interrogatories, etc. from the trial court **should have been transferred** by the trial court clerk to the bankruptcy court clerk when the Suggestion of Bankruptcy was filed. **This was not done and detrimentally affected Zehner and his ability to properly present and defend his case.**

Both counsel advised the judge of the witnesses for each side, and Judge Schiff stated that there **would** be more testimony than time available that afternoon, but that "all day tomorrow is available to conclude this matter." Zehner and Widmer testified, however, the hearing was cut short by the judge following Widmer's testimony and no other testimony was allowed. Further, because the hearing was **bifurcated**, Zehner was not allowed to testify or enter any evidence as to the substantial damages he sustained, both personally and through CSCI, as a result of Smith's acts and filing of this lawsuit. (App. L).

Judge Schiff stated that the burden was upon Zehner to prove the elements of his abuse of process claim, that being Smith's ulterior motive in pursuing his cause of action and secondly, to that end, use of the legal system in an improper, unwarranted and perverted manner. The judge further stated that "there must be a subsequent use of the process after the institution of the lawsuit and that particular use must be improper."

There was clear evidence and testimony that Zehner and Smith were competitors. There was clear evidence of Smith's entering the case with **unclean hands**, as this was the fourth affirmative defense in the Davis answer to the complaint. There was further evidence of **Smith's unclean hands** by Zehner's testimony regarding the illegal offer Smith made to Zehner concerning shipping of contaminated tanks. Furthermore, **Smith continued to deal with unclean hands with the court**, as to his secret shipping of hazardous PCB-laden materials, which he certified in his Complaint he did not do.

Judge Schiff clearly erroneously indicated that Zehner should have filed for sanctions during the discovery problems in trial court, totally unaware that Zehner had in fact filed for sanctions. Because Judge Schiff did not review the trial court record, he ignored material facts in this case, which detrimentally affected Zehner's ability to receive a fair and judicial ruling. Judge Schiff was clearly erroneous in his decision in stating that Zehner should have filed for sanctions, when in fact, sanctions had been filed more than once.

Judge Schiff was confused by the testimony of Widmer (third party claimant) as to competition between Smith and Zehner. Widmer in his **confused** testimony clearly also testified of his competitive activities on behalf of CSCI at both the Anne Arundel County Landfill and Charles County Landfill. This testimony as to competition was corroborated in the deposition of William Taylor (Smith's witness), who worked at the Anne Arundel County Landfill, when he testified that Widmer delivered to him a sales package on behalf of CSCI; Taylor further testified in deposition that he couldn't give the fluff business to CSCI because they were already doing fluff business

with Smith. In fact, in his deposition, Taylor clearly stated that Widmer requested that Taylor "just cut back on loads that Smith delivers so that I could take loads from him." (App. F). This clearly documents that Smith and Zehner were competitors, and that Judge Schiff clearly did not consider the **relevant facts of CSCI employee Widmer's confused testimony** as to competition between Smith and Zehner.

Following Widmer's testimony, both counsel had a bench conference with off-the-record discussion, and the hearing was concluded. Judge Schiff indicated that he would make a decision the next morning as to whether or not the case would proceed. At the hearing the next day, no further testimony of the additional witnesses and experts was allowed, despite the fact that both sides had numerous witnesses and experts that had not yet testified, and the fact that Judge Schiff indicated at the beginning of the hearing that "all day tomorrow is available to conclude this matter." As such, Zehner was assured **by both the court and Smith's counsel that there would be sufficient time available for all witnesses, including Smith, to testify**. At that time, Zehner's counsel indicated his witnesses were Zehner and Widmer, as well as three (3) experts (two as to monetary damages and one as to psychological evaluation). Smith's counsel stated the witnesses he **would** call were Smith, Nathanial Exum and Edgar Johnson. In front of the court, Zehner was promised by Smith's attorney Wyrough that he "**would** be calling Paul Smith" as a witness and that led Zehner to believe that the court **would** require Wyrough to keep his word to have Smith testify, so as to afford Zehner's counsel an opportunity to question Smith. Zehner was misled and deceived by Smith's counsel Wyrough in front of the court, in that Wyrough stated Smith **would** be called as a witness but was **not**. This limited

Zehner's testimony because Zehner would have provided much more elaborate testimony had he not been misled that Smith **would** testify; Zehner did not want to divulge in his testimony the areas of questioning of Smith prior to Smith's actual testimony. Further, that if Zehner had known that Smith would not testify, the deposition of Smith would surely have been introduced into evidence in lieu of Smith's actual court testimony. **As such, Zehner was misled and denied the appearance of a fair trial, and was again denied due process.**

Judge Schiff rendered his opinion and ruled that Zehner had not met the burden of proof and disallowed Zehner's claim. This decision is clearly erroneous, in that Zehner clearly proved the necessary elements of his abuse of process claim. Judge Schiff made his decision without reviewing any testimony of Smith and his main witness Taylor, either in court or in deposition, but rather, based his decision solely on the confused testimony of a former employee of Zehner/CSCI (Widmer).

**C. U.S. District Court**

Zehner noted an appeal of the bankruptcy court decision to the U.S. District Court. However, unknown to Zehner, the transmission of **record was incomplete and altered**, and the original Complaint (filed by Smith against Zehner) was not included in the appeal documents to the U.S. District Court. Zehner was under the impression that the total lower court record had been automatically provided, when in fact, it had not. The transfer documents from lower court were not available to the U.S. District Court, because the documents were never received by the Bankruptcy Court. By letter dated April 3, 1997, Judge Kier of the Bankruptcy Court notified Zehner that there was an

error in the designated record to the U.S. District Court Clerk, in that the Complaint was not transferred with the Notice of Appeal.

Judge Nickerson found Zehner's testimony was inadequate, in that he did not prove an element of the abuse of process claim, **and Zehner was asked what if anything Smith did after the filing**. Zehner's testimony was precise on that issue, in that he testified that Smith "lied in court"; however, the transcript was altered before it reached Judge Nickerson because that specific **question and statement are not in the transcript**. There are available Affidavits of persons who were present at that hearing and recall Zehner's specific testimony that is missing from the transcript.

It is clear that Zehner listed the original Complaint as document number 1 on his designation of items to be included in appeal, and that said pleading **was altered** by someone in the court system with a big "X" to eliminate said Complaint from being forwarded to the Judge. Thereby, the U.S. District Court was denied crucial information necessary to sufficiently evaluate this case.

The defense of unclean hands by co-defendant Davis did not make it to Judge Nickerson, and Wyrough falsely and clearly argued to Nickerson that said defense was not in evidence; however, said defense was clearly documented as "in evidence" because it was part of the lower court record (which Wyrough himself submitted) and should have been part of the transfer documents. Also, Judge Nickerson did not even receive the bankruptcy court transcript, as it was also part of the missing transfer documents. As such, at least 90% of the documentation

that should have been transferred to Judge Nickerson was in fact never properly and timely transferred to or received for review by the judge.

**D. U.S. Court of Appeals for the Fourth Circuit**

Following Judge Nickerson's decision of October 15, 1996, an appeal to the U.S. Court of Appeals for the Fourth Circuit was noted and timely filed by Zehner. After oral argument on July 7, 1997, a decision was rendered August 5, 1997 affirming the District Court's decision, on the basis that Zehner had failed to meet the third element of the tort of abuse of process (i.e., damages resulting from arrest or seizure of property).

The Fourth Circuit opinion states that "The facts material to resolution of this appeal are not in dispute." This is **totally** false, in that the facts have been consistently disputed by Zehner throughout this case. The opinion goes on to state that Smith's initial Complaint stated that Zehner had accused Smith of selling contaminated fluff and filing false test results, when in fact, Smith was never accused of selling contaminated fluff. The deposition testimony of William Taylor confirms this fact and confirms that the court is in error. (App. F).

The Fourth Circuit opinion's incorrect statement of facts indicates that Smith's Complaint alleged that Zehner conspired with Smith's formerly discharged disgruntled employee, Sidney Shores, by delivering a letter to the Prince George's County Council regarding lab test results/analysis showing hazardous PCB levels. This was totally discredited by both Zehner's testimony **and Smith's own testimony**. Smith himself stated in his deposition that he had misread the test results and that there

was no "700 parts per **million**" PCB test as charged, but rather the result was "700 parts per **billion**" which equates to .7 or less than one part per million (ppm) and is non-hazardous; the result must be at least 50 parts per million to be hazardous. (App. K). Therefore, all of Smith's charges as to said test result/analysis are **knowingly** false, as he had knowledge of that prior to and during the entire course of this case. Thereby, the statement of fact as described in the Fourth Circuit opinion is **totally erroneous**.

Zehner then filed a Petition for Rehearing and furnished the Fourth Circuit Court with the numerous documents previously not transferred to the Judges for their review, arguing that the Court had confused abuse of process with malicious abuse of process, and further argued that the issue of damages was not (and never had been) before the Court. Damages were not addressed by the Bankruptcy Court or the U.S. District Court, as the bankruptcy hearing was **bifurcated**. As a result, Zehner was unable to present any testimony or enter any evidence as to the amount or type of damages actually sustained and being sought, which damages included **seizure of property**. The Petition for Rehearing was erroneously denied by the U.S. Court of Appeals on September 17, 1997.

Clearly and factually, Zehner was not allowed to enter any evidence to support the third element of abuse of process, i.e. damages. Although Zehner had incurred substantial personal and business damages (**monetary loss and seizure of property**), because the case was **bifurcated** Zehner was not allowed to enter any such evidence.

## III. SUMMARY

This case should have been resolved by the trial court. Smith's intent and motive since he initiated this litigation over five (5) years ago has been to destroy Zehner and his business, due to the competition between them. A complete and thorough review of this case will show that Smith is guilty of perjury and fraud upon the court. **Zehner is totally innocent of all charges by Smith.** Smith is secretly shipping out of his plant through third parties hazardous PCB capacitors, despite the fact that he stated in his Complaint such materials are not allowed in his plant. Zehner has proof and physical evidence of Smith's surreptitious business dealings (i.e. copy of cancelled checks payable to CSCI for fees for referring companies to Smith for receiving and shipping out of his plant such extremely hazardous PCB capacitors, etc.; **said checks were discovered after the hearing with Judge Schiff, and which he has forwarded to the courts).**

As such, this case should be reversed and remanded to allow Zehner an opportunity to properly defend this matter and present his entire case, which rights are guaranteed to him by due process of law. U.S. CONST., amend. V; U.S. CONST., amend. XIV, § 1.

## REASONS FOR GRANTING THE PETITION

### I. SPECIAL CASE & STRICT LIABILITY

The proceedings in this matter have so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the lower court, as to call for an exercise of this Court's supervisory power.

This is a very special case because it is so far out of the ordinary that we have found no precedent setting case that comes close to the many conditions of this case.

All parties involved are in the business of recycling and shipping/disposal of dangerous, toxic and hazardous materials. Because the handling of toxic hazardous waste is involved, strict liability is an issue where **utmost** care is required. The strict liability statute imposes criminal sanction for an unlawful act without requiring a showing of criminal intent. (Black's Law Dictionary, Abridged Fifth Edition, 1983). Strict liability crimes are unlawful acts whose elements do not contain the need for criminal intent and are usually acts that endanger the public welfare, such as illegal dumping of toxic wastes. (Black's Law Dictionary, Sixth Edition, 1990). Therefore, Smith, as a professional, should have used **utmost** care before he filed the 100% false lawsuit.

### II. ABUSE OF PROCESS

A. *Did the U.S. Court of Appeals for the Fourth Circuit err in its determination that the facts material to resolution of this appeal are not in dispute?*

The Fourth Circuit opinion states that "The facts material to resolution of this appeal are not in dispute." This is totally false and is clearly documented by the record, in addition to the fact that Zehner has continually disputed the facts as alleged by Smith. Further, Smith has made numerous inconsistent statements as to his competition and business dealings with Zehner. Smith was never accused of selling contaminated fluff. Taylor's deposition testimony confirms this fact and confirms that the court is clearly in error. (App. F).

The opinion goes on to incorrectly state that Smith's Complaint alleged that Zehner conspired with Sidney Shores in connection with a certain lab test showing unfavorable results being delivered to P.G. County officials. This is totally discredited by testimony of Zehner, Smith and Taylor. Zehner testified that he had never heard of Sidney Shores prior to receiving this lawsuit, and thus could not have conspired with someone he did not know of. Smith himself admitted during his deposition testimony that he had misread the test results, which were in fact not harmful. (App. K). Therefore, the whole basis for this lawsuit that Smith filed because of falsified laboratory tests or analyses is 100% false and without foundation, which could not have been delivered to anybody because they do not exist and never existed. Therefore, **the Fourth Circuit opinion indicating that the statement of facts were undisputed is totally erroneous**.

B. *Did the U.S. Court of Appeals for the Fourth Circuit err in its determination that the Appellant failed to meet his burden of proof supporting his claim as to the three elements of abuse of process (i.e. competition and ulterior motive, perverted use of legal system after filing, and damages)?*

An abuse of process claim is based upon an improper use or perversion of process after it has been issued, and rests upon improper use of regularly issued process. (Black's Law Dictionary, Sixth Edition, 1995). The necessary elements of an abuse of process claim are ulterior motive, perverted use of legal system after filing, and damages (arrest of person or seizure of property).

The Fourth Circuit opinion states, in pertinent part, that,

> "... Here, we need not consider whether the Creditors' claims meet the first and second elements of an abuse of civil process claim under Maryland law, because they obviously fail to meet the third element. Rather than alleging damages in the form of arrest of the person or seizure of property, the Creditors have only alleged damages in the form of loss of business and loss of investment. ..."

Smith and his attorneys stated in the initial Complaint approximately thirty (30) times that Smith and Zehner were competitors, which was introduced as evidence. At the sanctions hearing before Judge Missouri, Smith's attorney (Farrington) stated that the reason they did not produce the requested discovery documents to Zehner was "on the basis that they are **serious competitors** ... and we're saying to them that they **are competitors in the area of fluff** ...." (App. I).

**Smith's main witness, William Taylor**, clearly testified as to competition between Zehner and Smith. Taylor testified at length that Widmer delivered a sales package to Taylor on behalf of Zehner/CSCI, and that Widmer tried to persuade Taylor to do

business with Zehner. Widmer went so far as to suggest that Taylor reduce loads of fluff to Smith so that Taylor could give those loads to Zehner/CSCI. (App. F). **This clearly verifies business competition between Zehner and Smith, as well as Smith's ulterior motive in filing the lawsuit was to destroy his principal competitor Zehner, and proves the first element of abuse of process.**

Smith is absolutely guilty of the second element of abuse of process, perverted use of the legal system after filing. Smith is obviously guilty of perjury and fraud upon the court, as evidenced by his many documented inconsistent statements.

Smith clearly perverted the legal system by his repeated failure to cooperate or respond in trial court discovery. Smith refused to answer interrogatories and produce requested documents. In an opposition to Zehner's motion for sanctions, Smith committed perjury by stating under oath that documents had been provided to Zehner when in fact **no** documents were provided (App. H). Smith continued to refuse to provide discovery, even after being ordered to do so by the court. Smith purposely prolonged the discovery for sixteen (16) months before he filed bankruptcy, by lies and perjury, until he later found and used bankruptcy as vehicle to escape responding to discovery and the specially set jury trial. Smith has repeatedly committed perjury and intentionally misled the court to prolong the court's actions, all to prevent Zehner from proceeding with the specially set jury trial. **These acts, and others referred to in the Statement of Case, clearly prove Smith's perverted use of the legal system and the second element of abuse of process.**

Zehner has sustained substantial damages as a result of defending this lawsuit and the false allegations of Smith. Zehner's health was detrimentally affected, due to the tremendous amount of stress of both defending this lawsuit and trying to clear his good name and reputation in the business community. Zehner's businesses suffered substantial financial loss. In fact, the asphalt division of CSCI, a separate registered corporate entity, was completely destroyed and its property (thousands of tons of asphalt, stone, etc.) was seized by clients due to CSCI's inability to complete business contracts and jobs. The fluff division of CSCI was slowly destroyed and finally collapsed in January of 1996. Further, because the hearing was **bifurcated**, Zehner was not allowed to testify or enter any evidence as to the **damages** he sustained, both personally and through CSCI, as a result of Smith's acts and filing of this lawsuit. (App. L).

**Zehner has incurred substantial damages and seizure of property, which proves the third element of abuse of process.** Further, Smith has achieved his goal of destroying his principal competitor (Zehner), and suffered no actual out-of-pocket expenses in the process. Smith, after filing a $4.5 billion lawsuit, admitted in his response to document requests that he lost no business or customers.

## III. DENIAL OF DUE PROCESS

A. *Did the Judge err in his determination to conclude the bankruptcy hearing prior to allowing the testimony of all witnesses and experts present as indicated by counsel would be called at such hearing, thereby denying Appellant due process?*

Zehner has been denied his Constitutional right of procedural due process in this case, including but not limited to denial of complete discovery, lack of jury trial, and inability to enter evidence of damages sustained. U.S. CONST., amend. V; U.S. CONST., amend. XIV, § 1.

Judge Schiff, sitting in by designation, was unfamiliar with the history of this very complicated case. Although the Judge was aware that he did not have all relevant documents necessary to properly assess this case, Judge Schiff immediately proceeded to begin the hearing without proper preparation and knowledge of the case. Even in his decision, Judge Schiff recognized that there were discovery problems in the trial court, as testified to by Zehner. Judge Schiff, because of the missing documents that he did not review, was totally unaware of Zehner's vigorous pursuits to obtain discovery from Smith and Smith's obvious perjury to evade discovery and sanctions, and he held only a two (2) hour hearing in place of a two (2) week jury trial.

Judge Schiff did not have the documents necessary to properly evaluate this case and make a fair judicial ruling. Rather, Judge Schiff made his ruling without benefit of: the trial court docket, Complaint, Davis defense of unclean hands, and **the copy of business cards which was fabricated manufactured proof placing Zehner at the scene of the alleged crime.**

B. *Was the appellant denied due process by the fact that he has been and continues to be denied a copy of the tape of the bankruptcy hearing, even though the Fourth Circuit made their hearing tapes available immediately without question,*

*yet bankruptcy court continues to refuse tapes, and that the court record has been altered in a major way?*

Zehner has already proved that the court record was significantly altered by someone within the court system by removing the Complaint from Zehner's Notice of Appeal, as more fully elaborated in the Statement of Claim (by Judge Kier's correction of the record), **which clearly denied Zehner due process**.

Zehner requested a transcript of the bankruptcy hearing, which revealed that this record had also been altered by deletions of certain testimony. Zehner then requested a copy of the actual tape so that he could have it analyzed. Zehner was first denied the tapes by the court reporter. Second, Zehner was denied the tape by Judge Kier. Third, Zehner again requested the tape by letter to Judge Kier with Affidavits of persons who were present at the hearing and attested to the missing testimony; **Judge Kier forwarded Zehner's request to the Department of Justice**. Fifth, Zehner was denied the tape by the Fourth Circuit. Sixth and most recently in this ongoing request, Zehner's attorney Thomas is filing a Subpoena requesting the tape, so that the court may have the total record which to this date no one has been able to provide because of the altered records.

Despite his many requests and explanations, Zehner has repeatedly been denied a copy of the bankruptcy hearing tape, and was thereby **denied due process**.

C. *Was the appellant denied due process by the fact that he lost his jury trial because of Smith and his attorney's clear*

*perjury to the trial court to delay this case until Smith found a vehicle to evade the set jury trial?*

This matter was specially set for a two-week jury trial in the trial court. (App. J). However, because of the clearly documented perjury and misrepresentations to the court by Smith and his attorneys, particularly throughout discovery, the case was delayed and prolonged until Smith used bankruptcy as a vehicle to escape the set jury trial. To this day, discovery has never been completed and no jury trial has occurred, despite five and one-half (5½) years of litigation.

As such, Zehner has been denied his Constitutional right of procedural due process in this case by his lack of jury trial. U.S. CONST., amend. VII.

## IV. PERJURY/FRAUD UPON THE COURT

A. *Did the Judge err when he referred to Appellant's lack of pursuit of discovery sanctions remedies at the lower court level, when the record clearly reflects such remedies were in fact pursued by Appellant?*

Court records were missing, which adversely affected Appellant's case in that extremely important evidence necessary to prove the Appellant's claim was not available for the court's review and consideration. The missing documents included the trial court docket, which clearly verified that Zehner in fact filed more than once for sanctions, and was denied each time due to Smith and his attorney's lies and misrepresentations to the court.

B. *Did the Trial Court err in its determination to deny Appellant's requests for discovery sanctions for Appellee's refusal to cooperate with discovery based upon Appellee's perjury and fraud upon the court by falsely indicating that documents had been provided to Appellant.*

"Discovery rules are broad and comprehensive in scope and one of their fundamental objectives is to require disclosure of facts by party to all of its adversaries and thereby eliminate, as far as possible, necessity of any party going to trial while confused as to facts that gave rise to litigation." Maryland Rules, Rules 410, 417, as cited in Baltimore Transit Company v. Mezzanotti, 227 Md. 8, 174 A.2d 768 (1961).

Smith and his attorney have repeatedly and consistently refused to cooperate in the discovery process of this case. Smith and his attorney misled the court by stating under oath that they had provided discovery documents to Zehner when in fact no documents were provided (App. G & H), which caused the denial of Zehner's first sanctions request. Then, after stating under oath that they had provided the requested documents, Smith and his attorney stated under oath that the documents were privileged because customer lists and trade secrets were requested and that Zehner, as a competitor, and was not entitled to such documents. (App. I). However, the documents Zehner requested **did not** include customer lists or trade secrets, as evidenced by the Interrogatories and Answers thereto, which left the second sanctions hearing undecided.

Because of perjury and misrepresentations to the court by Smith and his attorney, Zehner has been completely denied his legitimate requests for sanctions for Smith and his attorney's

failure to cooperate with discovery. A thorough review of the record clearly documents and verifies that Zehner was denied discovery sanctions as a direct result of Smith's perjury and fraud upon the court. As such, Zehner has been detrimentally affected in that the granting of sanctions would have brought about a quick resolution of this case in 1992.

The Constitutional provisions of due process require that "an advocate must disclose the existence of perjury with respect to a material fact, even that of a client ...." Rule 3.3, Maryland Lawyers' Rules of Professional Conduct, Annotated Code of Maryland.

As to a lawyer's obligation of fairness to opposing party and counsel, Rule 3.4 states,

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
>
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> * * *
>
> (d) in pretrial procedure make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

* * *

## V. UNCLEAN HANDS

A. *Did the court err in its decision in not finding against the Appellee based upon the doctrine of unclean hands, in that there was fraud in the possession of Smith's main witness false manufactured evidence dated 47 days before the lawsuit was filed and that Appellee was dismissed from a mutual business association for attempting to involve Appellant Zehner in a mutually beneficial and illegal enterprise?*

This case has been clouded by outright lies and misrepresentations, including fraud upon the Court, as evidenced by Smith's numerous and repeated inconsistent statements and allegations about Zehner, their businesses and competition, types of tests and test results, business associates, and more.

Smith was guilty of the very thing that he accused Zehner of doing and used the court as **a weapon** against Zehner. Knowingly and simultaneously **while he was prosecuting CSCI/Zehner, Smith was receiving and shipping toxic hazardous waste through third parties**, as evidenced by checks paid to CSCI/Zehner as finder's fees for referring Environmental Services, Inc. to Smith for hauling out of Smith's plant materials containing substantial amounts of toxic hazardous PCB capacitors and transformers, which places these actions under the strict liability laws where **utmost** care is required, and which Smith thereby **recklessly disregarded**.

Contrary to what was actually happening, Smith certified to the State of Maryland, to the courts, and to the general public that no unacceptable materials (such as toxic hazardous PCB-laden capacitors) were allowed to enter his plant); Smith further

certified and verified that all materials processed through his plant would be recycled for some useful purpose.

At oral argument on August 5, 1997 in the U.S. Court of Appeals for the Fourth Circuit, the court indicated that this case should have been resolved by the lower court due to its familiarity with the case and availability of the pleadings.

> "The RICO suit Judge knew the action. He was familiar with the parties. He had the filings. He had the pleadings before him. And that whole matter should have been wrapped up there, rather than asking a bankruptcy judge to start from scratch, with all the start-up costs in an abuse of process action and with a hundred other things to do."

(Oral Argument Transcript, p.26 lines 19-25 and p.26 lines 1-2).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Fred G Zehner

FRED G. ZEHNER

Date: 1-29-98

# APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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In Re: Joseph Smith & Sons, Incorporated; In Re: Richard Wybrough,
*Debtors.*

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Fred G. Zehner; Contaminated Soil Consultants, Incorporated,
*Claimants-Appellants,*
and
Benedict A. Widmer,
*Claimant,*
Claude B. Shaffer,
*Party in Interest,*

v.

Joseph Smith & Sons, Incorporated,
*Debtor-Appellee.*

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Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William M. Nickerson, District Judge.
(CA-96-137-WMN, BK-94-12947)

Argued: July 7, 1997

Decided: August 5, 1997

Before WILKINSON, Chief Judge, and WILKINS and HAMILTON, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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## COUNSEL

**ARGUED**: Bruce Montgomery Marshall, DURRETTE, IRVIN & BRADSHAW, P.C., Richmond, Virginia, for Appellants. Richard R. Page Wyrough, CAIN & WYROUGH, Upper Marlboro, Maryland, for Appellee. **ON BRIEF**: Douglas Scott, DURRETTE, IRVIN & BRADSHAW, P.C., Richmond, Virginia; Martin B. Ellis, SCHULMAN, TREEM, KAMINKOW & GILDEN, P.A., Baltimore, Maryland, for Appellants.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

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## OPINION

PER CURIAM:

Contaminated Soil Consultants, Inc. (CSC) and its president and primary shareholder, Fred G. Zehner (Zehner) (collectively the Creditors), appeal the district court's affirmance of the bankruptcy court's order disallowing their claims against the bankruptcy estate of Joseph Smith & Sons, Inc. (JSS) for damages flowing from JSS's alleged abuse of civil process. The bankruptcy court disallowed the Creditors' claims on the basis that they could not establish all the

elements of the tort of abuse of civil process under Maryland law. The district court agreed. We affirm.

I.

The facts material to resolution of this appeal are not in dispute. At all times relevant to this case, CSC and JSS were both participants in the waste management industry in the State of Maryland. Specifically, both companies sold a product known as "fluff," a byproduct of the process of recycling scrap metal. Fluff is used to cover up refuse in landfills. After JSS was generally accused of selling contaminated fluff and falsifying lab reports, it filed suit against the Creditors in Maryland state court, alleging various causes of action, including, among others, fraud, conspiracy to commit fraud, defamation and intentional interference with business relations (the Tort Action). The complaint alleged in part that the Creditors conspired with a former disgruntled employee of JSS to harm JSS by delivering a letter to every member of the Prince George's County Council that contained false statements about JSS and by delivering to the same persons copies of false laboratory analyses that were alleged to be from fluff manufactured by JSS.

While the Tort Action was pending, JSS filed for bankruptcy in the United States Bankruptcy Court for the District of Maryland. Thereafter, JSS removed the Tort Action to the bankruptcy court. Following extensive discovery between JSS and the Creditors, JSS made a motion to voluntarily dismiss the Tort Action. The bankruptcy court granted the motion.

Each creditor subsequently filed a proof of claim in the JSS bankruptcy case for $2.5 million. The proofs of claim listed the tort

of abuse of civil process as their basis. According to the proofs of claims, JSS's filing and subsequent maintenance of the Tort Action "caused [them] severe financial damages ... in the form of loss of business and loss of financial investment." (J.A. 41, 44).

JSS objected to the Creditors' claims on the basis that they did not allege facts necessary to establish the tort of abuse of civil process under Maryland law. After conducting a hearing on the matter, the bankruptcy court sustained JSS's objections and disallowed the Creditors' claims. The Creditors appealed to the district court, alleging various points of error, including that the bankruptcy court had improperly allocated the burden of proof between the parties. The district court affirmed the bankruptcy court, and the Creditors noted a timely appeal.

II.

As do district courts, we review the factual findings of a bankruptcy court for clear error and its conclusions of law *de novo*. *See In re Johnson*, 960 F.2d 396, 399 (4th Cir. 1992). Here, our review reveals that the bankruptcy court did not err in sustaining JSS's objections and disallowing the Creditors' claims.

The parties agree that the Creditors' claims must be tested under Maryland law. As most recently articulated by the Court of Appeals of Maryland, the elements of the tort of abuse of civil process in Maryland are: (1) a willful use of civil process on the part of the defendant after the process has issued in a manner not contemplated by law; (2) an ulterior motive; and (3) damages resulting from the defendant's abuse of process in the form of arrest of the person or seizure of property of the plaintiff. *See One Thousand Fleet Ltd.*

*Partnership v. Guerriero*, 1997 WL 324389, at *4, *9 (Md. June 12, 1997). In elaborating on the last element, the court in *One Thousand Fleet, Ltd.* quoted the following passage from *Bartlett v. Christhilf*, 14 A. 518 (Md. 1888), with approval:

> All the cases upon this subject depend either upon the arrest of the person or seizure of his property; and we have been referred to none where this action was sustained for an injury to the plaintiff's business or good name. Any unfounded suit may result in such injury; but it will hardly be seriously contended that where there has been no wrongful deprivation of liberty or no illegal seizure of property, that each unfounded suit is to be treated s such an abuse of process of the law as will sustain action against the one who instituted it.

*One Thousand Fleet Ltd.*, 1997 WL 324389, at *9 (quoting *Bartlett*, 14 A. at 522).

In accord with this statement of Maryland law, the court in *One Thousand Fleet, Ltd.* affirmed a trial court's dismissal of an abuse of process claim, because the plaintiff, a Maryland limited partnership engaged in real estate development in Baltimore City, Maryland, only alleged that it "lost money, suffered a delay of [one of] its project[s], and faced increased construction, legal and financing costs" as a result of the defendant's alleged abuse of process. *Id.* at *9-10. The plaintiff did not allege arrest of the person or seizure of its property. *Id.* at *10.

Here, were need not consider whether the Creditors' claims meet the first and second elements of an abuse of civil process claim under

Maryland law, because they obviously fail to meet the third element. Rather than alleging damages in the form of arrest of the person or seizure of property, the Creditors have only alleged damages in the form of loss of business and loss of investment. Under Maryland law as most recently articulated in *One Thousand Fleet, Ltd.*, such allegations, even if proven to be true, cannot meet the third element. Accordingly, we affirm the district court's decision affirming the bankruptcy court's order sustaining JSS's objections and disallowing the Creditors' claims.

AFFIRMED

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| BENEDICT A. WIDMER, et al. | * | |
| | * | |
| v. | | Civil Action No. WMN-96-137 |
| | * | |
| JOSEPH SMITH AND SONS, INC. | * | |

### MEMORANDUM

Pending before this Court is an appeal from a decision of the United States Bankruptcy Court for the District of Maryland (Bankruptcy Case No. 94-12947-DK), the Honorable Gerald H. Schiff, sitting by designation. Upon a review of the briefs,[1] the record and the applicable case law, the Court determines that no hearing is necessary (Bankruptcy Rule 8012), and that the decision of the Bankruptcy Court will be affirmed.

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[1] Claude B. Shaffer, a former employee of Appellant Contaminated Soil Consultants, Inc., obtained leave of Court to file an amicus curiae brief. Appellee opposed the Amicus brief claiming it was an improper "Amicus petitor" brief that should be disregarded by the Court. The Court does not need to resolve this dispute between the parties because the Court did not find that Mr. Shaffer's brief changed the outcome in the present appeal.

## I. BACKGROUND

Appellant Contaminated Soil Consultants, Inc. ("CSCI"),[2] and Appellee Joseph Smith and Sons, Inc., are both participants in the waste management industry, although whether they are direct competitors is a disputed issue between the parties. Both businesses are involved in the sale of "fluff," a byproduct of scrap metal recycling, which is used to cover up refuse placed in local landfills.

After being accused of selling contaminated fluff and falsifying lab reports, in June of 1992, Appellee filed a lawsuit against Appellants and others in the Circuit Court for Prince George's County.[3] Appellee subsequently filed its Chapter 11 petition on June 6, 1994. Appellants then filed proofs of claim in the bankruptcy proceeding alleging abuse of process against Appellee based upon Appellee's filing and prosecution of the Prince George's County action. Appellee filed a motion to estimate Appellant's claims as well as objections to those claims.

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[2] The other two appellants are Fred Zehner, owner of CSCI, and Benedict A. Widmer, a former employee of CSCI.

[3] This Court was not provided by Appellants with Appellee's original complaint, although it appears to have been admitted into evidence during the October 17, 1995 hearing. Therefore, it is not clear what was alleged in that lawsuit. Appellants state that there were nine (9) counts, Appellants' Brief at 4, and Judge Schiff referred to fraud and misrepresentation claims as well as claims under RICO, Oct. 17 Transcript at 4.

A hearing was held on October 17, 1995 before Judge Schiff. The parties agreed that the matter would be bifurcated to address first whether Appellants had a valid claim and then to address the amount of damages. After Appellants presented their case on liability, the hearing was recessed, and the court gave counsel an opportunity to provide further authority on the issue of liability. The hearing was resumed on the following day, and the court ruled from the bench that Appellants had not stated a cause of action for abuse of process under Maryland law.

## II. LEGAL STANDARD

Factual findings of the Bankruptcy Court are reviewed under a clearly erroneous standard. Lubrizol Enterprises v. Richmond Metal Finishers, 756 F.2d 1043 (4th Cir. 1985), cert. denied, 475 U.S. 1057 (1986). Conclusions of law are reviewed de novo. Caswell v. Jeffrey Lang, 757 F.2d 609 (4th Cir. 1985). Decisions committed to the discretion of the trial court are reviewed under an abuse of discretion standard. In re Southmark Corp., 88 F.3d 311, 314 (5th Cir. 1996).

## III. DISCUSSION

### A. Format of Judge Schiff's Opinion

Appellants complain that Judge Schiff did not comply with Fed. R. Civ. P. 52 because he did not specifically identify findings of fact and conclusions of law. From its review of the hearing transcript, this Court disagrees. The record clearly shows that Judge Schiff stated his findings of fact with regard to each element of Appellants'

claim of abuse of process, albeit briefly. See Oct. 18 Transcript at p.4 lines 12-22, p.5 lines 8-11.

B. Burden of Proof

Appellants also argue that Judge Schiff's conclusion of law that the burden of proof was on Appellants is clearly erroneous. Appellants explain that Judge Schiff stated that the debtor must rebut the initial presumption that a claim is valid,[4] but that in this case there was no rebuttal because Judge Schiff adjourned the hearing before the debtor put on any evidence. Appellants' Brief at 16.

The bankruptcy code makes clear that a proof of claim is allowed unless an objection to it is raised. 11 U.S.C. § 502(a). In the interest of judicial economy, only those claims which are contested have to be proved. It is the debtor's objection, supported by probative evidence where necessary,[5] which rebuts the presumption

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[4] Judge Schiff stated at the beginning of the hearing that where "there's been an objection filed based upon the lack of substantiation of a claim, then I think the burden of going forward rests on upon the claimant." Oct. 17 Transcript at 6-7.

[5] Appellee's objection to Appellant's proofs of claim challenged Appellants' right as a matter of law to recover on the basis of an abuse of process claim. See Joint Objection to Claims of Fred G. Zehner, Contaminated Soil Consultants, Inc. and Benedict A. Widmer, Paper No. 1, at 5 ("The Zehner Claim provides no allegations which would support a claim based on abuse of process.") Therefore, Appellee would not have a burden to produce probative evidence but rather would have met

of validity of the claim and shifts the burden of production back to the claimant. In re Harrison, 987 F.2d 677, 680 (10th Cir. 1993). Because Appellee rebutted the presumption of validity of the claim in its objection, Judge Schiff's conclusion that the burden of proof rested with Appellants was correct.

C. Abuse of Process

On the substantive issue in the case, Appellants argue that the court erred in its determination that Appellants had failed to show that Appellee had engaged in the abuse of process. The tort of abuse of process in Maryland focuses on the purpose for which the process is used once it has been properly issues in a case. Palmer Ford, Inc. v. Wood, 298 Md. 484, 511, 471 A.2d 797 (1984). The essential elements of the cause of action are (1) an ulterior motive, (2) a wilful act in the use of the process not proper in the regular conduct of the proceeding, and (3) damages resulting from the perverted use of the process. Berman v. Karvounis, 308 Md. 259, 262, 518 A.2d 726, 727 (1987). "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required." Palmer Ford, Inc., supra, quoting from Prosser, Law of Torts 857 (4th ed. 1971). There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.

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its burden of production merely by raising the legal objection to the claims. See World Savings and Loan Ass'n v. Lenz, 110 B.R. 523, 525 (D. Colo. 1990) (where objection made as a matter of law, burden of going forward shifted back to claimant to prove legitimacy of its claim).

Herring v. Citizens Bank & Trust Co., 21 Md. App. 517, 535, 321 A.2d 182, 192 (1973), (quoting from, Prosser, supra, at 857), cert. denied, 272 Md. 742 (1974).

Appellants argue in the present case that Appellee filed the multi-count lawsuit with the ulterior motive of injuring Appellants' competitive position in the industry. Appellants further argue that Appellee acted improperly post-filing by prolonging the lawsuit unnecessarily, by failing to cooperate in discovery, and by neglecting to reduce the ad damnum request.[6]

Appellee correctly counters that Appellants argument essentially goes to Appellee's allegedly improper motives in filing the lawsuit in the first place. What motivated the initial filing of the lawsuit is immaterial to an abuse of process claim. Herring, 21 Md. App. at 532.

Appellee also denies that it failed to cooperate in discovery or otherwise unnecessarily prolonged the litigation in order to vex Appellants. Judge Schiff did not make a specific factual finding in this regard, but simply stated that to the extent that the failure to complete discovery or to dismiss the lawsuit was the basis for the

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[6] The parties are in disagreement as to what this amount was and, again, because the Court does not have a copy of the Complaint, it is difficult to resolve this question. Appellees claim that it was fifty-five million dollars including compensatory and punitive damages, but Appellants argue that amount was for just one of the nine counts and that the total for all the amounts was $1.365 billion.

claim of abuse of process, these actions do not equate to the improper, unwarranted and perverted use of process required for this tort. Oct. 18 Transcript at 5.

In Palmer Ford, the Court of Appeals found that there was sufficient evidence to create a reasonable inference that the defendant had used criminal proceedings to collect a debt from the plaintiff where the defendant had told the plaintiff's mother that unless her son's debt was paid, her son would be arrested and sent to jail. 298 Md. at 489-90. The court stated that a creditor cannot use the State's criminal courts as a private collection agency. Id. at 511-12. By contrast in Berman, the court held that there were no facts to show how the process was used for any purpose other than the normal one of obtaining personal jurisdiction. 308 Md. at 265. The court suggested that for this tort to have occurred, the defendant must have used process in some abnormal fashion to coerce or extort money or property from the plaintiff. Id.

It is clear, then, that the facts alleged by Appellants in the present action do not rise to the level of the perverse use of process required for the abuse of process tort. If delaying or other uncooperative behavior in discovery and litigation was sufficient to make out this claim, unfortunately the courts would be flooded with these actions. Therefore, this Court affirms the bankruptcy court's conclusion of law that Appellants failed to show that an abuse of process had occurred.

D. Ulterior Motive

Because this court affirms the finding that there was no act which amounted to an improper or perverse use of process proper when

issued, it does not need to reach the question of whether such act was committed with an ulterior motive. Judge Schiff found as a factual matter that the evidence presented did not support the conclusion that there was an improper motive. Oct. 18 Transcript at 4. His factual finding is not clearly erroneous and would not be disturbed on appeal even were the Court to reach this issue.

E. Appellants' Remedies at Lower Court Level

Finally Judge Schiff stated that to the extent that Appellee had filed a complaint in bad faith or was uncooperative in discovery, Appellants had remedies in the state court trial such as a motion for sanctions. Id. Indeed, a court may impose sanctions upon a finding that a part acted in bad faith or lacked substantial justification for filing a complaint or upon certain failures of discovery or refusals to comply with orders compelling discovery. Md. Rules 1-341, 2-433 (1996). Judge Schiff's comment regarding Appellants' possible remedies below was not dispositive of Appellants' claim. Rather, taken in context, Judge Schiff was merely suggesting that the problems complained of by Appellants were more properly addressed through such motions during the trial of the Prince George's County action than through a subsequent abuse of process claim.

Appellants argue that the court's remarks were improper because Appellants had in fact pursued these remedies but to no avail. Appellant Zehner's testimony does not make explicit that Appellants had already pursued their remedies in this regard at the trial level, however. In the pertinent portion of his testimony, Zehner stated only that Appellee had responded falsely to interrogatories and had argued falsely in court in Prince George's County alleging that they

had provided information in discovery which they had not. Oct. 17 Transcript at 51.

To the extent that Appellants were arguing to Judge Schiff that their motion for sanctions was improperly denied by the state trial court, they did so in an impermissibly obtuse way. But Appellee is incorrect that such an argument would be an improper collateral attack on a lower court judgment. After Appellee filed bankruptcy, the proceedings in the state court, as well as any appeal of those proceedings, were stayed pursuant to 11 U.S.C. § 362. Therefore, Appellants did not have an opportunity to raise this issue other than in the bankruptcy case. But, because Appellants did not raise this issue in a sufficiently clear manner so that it could be ruled on by the bankruptcy court, the issue is not properly raised for the first time in this appeal.

## IV. CONCLUSION

For all the above-stated reasons, the decision of the United States Bankruptcy Court for the District of Maryland is affirmed. A separate Order will issue.

s/ William N. Nickerson
William M. Nickerson
United States District Judge

October 15, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| BENEDICT A. WIDMER, et al. | * | |
| | * | |
| v. | | Civil Action No. WMN-96-137 |
| | * | |
| JOSEPH SMITH AND SONS, INC. | * | |

ORDER

Upon consideration of the briefs filed, and of the record below in this appeal of the decision of the United States Bankruptcy Court for the District of Maryland, it is this 15th day of October, 1996, by the United States District Court for the District of Maryland hereby ordered:

1. That the judgment of the United States Bankruptcy Court is AFFIRMED;

2. That this case is hereby CLOSED; and

3. That the Clerk of the Court shall mail copies of the foregoing Memorandum and this Order to all counsel of record.

s/ William N. Nickerson
William M. Nickerson
United States District Judge

## APPENDIX C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MARYLAND
(Southern Division)

| | | |
|---|---|---|
| In re: | : | |
| | : | |
| JOSEPH SMITH & SONS, INC. | : | Case No. 94-1-2947 DK |
| | : | Chapter 11 |
| Debtor. | : | |
| | : | |

ENTERED OCT. 24, 1995

ORDER SUSTAINING OBJECTION TO CLAIMS OF FRED G. ZEHNER, CONTAMINATED SOIL CONSULTANTS, INC. AND BENEDICT A. WIDMER

Upon consideration of the Joint Objection Joseph Smith & Sons, Inc., debtor and debtor-in-possession herein, and R. Paul Smith, debtor and debtor-in-possession in related case styled In re R. Paul Smith, Case No. 94-1-2948 DK, requesting the Court to disallow in their entirety the claims of Fred G. Zehner, Contaminated Soil Consultants, Inc. and Benedict and Widmer (the "Objection"), on the basis that such claims are contingent, unliquidated and disputed, and appropriate notice having been given to the claimants and all other parties in interest, and based upon any response filed by the claimants, and for other reasons more particularly set forth in the Objection, it is hereby

ORDERED, that the Debtor's Objection be, and the same hereby is, SUSTAINED; and it is further

ORDERED, that Claim No. 34 asserted by Fred G. Zehner be, and the same hereby is, DISALLOWED in its entirety; and it is further

ORDERED, that Claim No. 35 asserted by Contaminated Soil Consultants, Inc. be, and the same hereby is, DISALLOWED in its entirety; and it is further

ORDERED, that Claim No. 38 asserted by Benedict A. Widmer be, and the same hereby is, DISALLOWED in its entirety.

Dated:_____ s/ Gerald H. Schiff
United States Bankruptcy Judge

Copies to:

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## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 17, 1997

No. 96-2744
CA-96-137-WMN
BK-94-12947

In Re: JOSEPH SMITH & SONS, INCORPORATED; In Re: RICHARD WYBROUGH

Debtors

---

FRED G. ZEHNER; CONTAMINATED SOIL CONSULTANTS, INCORPORATED

Claimants - Appellants

and

BENEDICT A. WIDMER

Claimant

CLAUDE B. SHAFFER

Party in Interest

v.

JOSEPH SMITH & SONS, INCORPORATED

Debtor - Appellee

## ORDER

The appellants have filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

s/ Patricia S. Connor

# APPENDIX E

EPA PROJECT SUMMARY

PCB, Lead, and Cadmium Levels in Shredder Waste Materials: A Pilot Study

*Authors and Research Team*

*Principal authors included Dan Reinhart, John Scalera, Brach Schultz, Cindy Stroup, and Joe Breen of the Exposure Evaluation Division, Office of Toxic Substances. This project summary was abstracted from a report on the Fluff Pilot Study written by Westat.*

*Field work was conducted by Westat, Midwest Research Institute, and Battelle Columbus Laboratories. Chemcisal analyses were performed at Midwest Research Institute, EPA's National Enforcement Investigation Center, and EPA's Environmental Systems Laboratory in Las Vegas, Nevada.*

*EPA's Office of Solid Waste, Characterization and Assessment Division co-sponsored the efforts and provided design, sampling, and analysis consultation for lead and cadmium portion of the pilot study. Alexander McBride was the principal contributor.*

* * *

* * *

Table 3. Summary of Total Lead Concentrations (ppm) by Sample Type

| Sample Type | Input Type | Mean | Standard Deviation | Median | Minimum | Maximum | No. of Samples | No. of Sites |
|---|---|---|---|---|---|---|---|---|
| Fresh fluff | Auto | 2,700 | 2,200 | 2,400 | 570 | 12,000 | 28 | 7 |
| Fresh fluff | White Goods | 3,100 | 3,200 | 1,800 | 1,300 | 14,000 | 15 | 5 |
| Fresh fluff | Mixed Input | 4,600 | 3,500 | 3,600 | 1,100 | 12,000 | 13 | 3 |
| Stored fluff | | 3,900 | 3,500 | 2,600 | 1,300 | 13,000 | 20 | 4 |
| Spillover | | 6,100 | 5,600 | 4,300 | 2,800 | 21,000 | 9 | 5 |
| Soil | | 2,200 | 3,900 | 1,100 | 8.1 | 16,000 | 16 | 5 |

Table 4. Summary of Total Cadmium Concentrations (ppm) by Sample Type

| Sample Type | Input Type | Mean | Standard Deviation | Median | Minimum | Maximum | No. of Samples | No. of Sites |
|---|---|---|---|---|---|---|---|---|
| Fresh fluff | Auto | 47 | 36 | 40 | 14 | 200 | 28 | 7 |
| Fresh fluff | White Goods | 48 | 19 | 47 | 23 | 87 | 15 | 5 |
| Fresh fluff | Mixed Input | 46 | 14 | 46 | 29 | 70 | 12 | 3 |
| Stored fluff | | 35 | 13 | 35 | 16 | 59 | 20 | 5 |
| Spillover | | 32 | 11 | 33 | 18 | 59 | 9 | 5 |
| Soil | | 22 | 24 | 18 | 10 | 100 | 16 | 4 |

* * *

CONCLUSIONS

In this pilot study, EPA's research team:

- Determined that PCBs were present in all sampled materials at all seven pilot study sites and that over 98% of the PCBs in all shredder output were associated with fluff; PCB concentrations in fluff ranged from **0.67 to 760 ppm**. (emphasis added)

- Determined that in the "worst case" scenario of leachability, a hot water extraction, only .0073% of the PCBs present leached from the sample on average. In a situation more closely resembling "real world" conditions, room temperature water extraction leached .0050% of the PCBs, on average, from the fluff. In both cases, the observed leachability of PCBs from fluff was lower than usually found in a wide range of soils.

- Could not conclude that any particular input material was the source of the PCBs, lead and cadmium found in shredder outputs. Cross-contamination of samples within sites may have masked the relationship between input material and contamination of resulting output materials.

  For example, if PCBs were released onto shredder surfaces during the shredding of PCB-containing items, fluff produced for some time after the initial release may have been contaminated as it came into contact with parts of the shredder apparatus, although no PCBs existed in the input materials associated with this fluff;

* * *

## APPENDIX F

IN THE CIRCUIT COURT FOR P.G. COUNTY, MARYLAND

JOSEPH SMITH AND SONS, INC., et al. *

Plaintiffs *

vs. CAL 92-10285 *

DAVIS INDUSTRIES, et al *

Defendants *

* * * * * * * * * * * * * * * * * * * * * * *

The deposition of WILLIAM J. TAYLOR was taken on March 23, 1994 commencing at 10:00 a.m. at the of Offices of Bel Air Reporting Associates, 510 South Main Street, Bel Air, Maryland before Penny L. Comeau, Notary Public.

Page 52, lines 19-21; Page 53, lines 1-6

A Okay. On this date, a gentleman by the name of, I think, Ben Widmer -- my handwriting wasn't any better then than it is now -- he just stopped in the office. His office manager was with him. It was a woman, but I didn't get her name. He game me some brochures and some printed material, some copies of newspaper

clippings and stuff like that. He said he represented a Virginia scrap dealer, and he wanted to bring fluff to the Millersville Landfill and he would be willing to pay two dollars per ton.

Page 53, lines 13-21

Q How long did that meeting take place?

A No longer than a half hour.

Q And how many people were present besides yourself?

A It was -- there was me and Mr. Widmer and a woman who he introduced as his office manager, but I did not get her name. I don't recall what her name was at the time.

Q What were the discussions during that meeting?

A Well, he said he wanted to bring fluff in. He would pay two dollars per ton. I said I was getting fluff from Smith under a State-approved test period; that I was getting as much as I needed. I didn't need any more.

Page 55, lines 6-14

Q Were there any further discussions that day at that meeting?

A Yeah. He said: Well, you ought to just cut back on the loads that Smith delivers so that I could take loads from him. Basically what I said to him was: Smith got here first....

* * *

Page 62, lines 19-21; Page 63, line 1

Q Were there any discussions at this meeting, Mr. Taylor, about Smith's test results to the best of your knowledge?

A No, not from him.

Page 68, lines 19-21; Page 69, lines 1-10

Q Do you recall ever accumulating business cards from Contaminated Soil Consultants, Inc.?

A I never got -- the only card I ever had was a card from Mr. Widmer which is why I called him back. I never -- I am assuming Fred G. Zehner is the guy I wrote on the memo as Mr. Zaines. I am assuming that is the same guy. I have never seen Zehner's card. I have never seen V.J. McPhatter's card. V.J. McPhatter, the name sounds familiar. That might be something else. I don't know who Claude Shaffer is.

Q You have no idea why those cards are in the file?

A No.

Page 80, lines 6-12

Q Now, other than this meeting that took place with the office manager and Mr. Widmer from CSCI and the two subsequent phone calls you referred to from Mr. Zehner or Zaines and Widmer, did you ever have any other contact with anyone from CSCI?

A Not that I know of. Not from anybody who identified themselves as being from Contaminated Soils.

Page 80, lines 19-21; Page 81, lines 1-3

Q So, to the best of your knowledge, did anyone from CSCI ever discuss with you any of Smith's test results and whether or not they had been misrepresented to the State and/or County? Do you have any actual knowledge?

A No. I don't think Mr. Widmer said that. No, I don't think they did.

* * *

## APPENDIX G

IN THE CIRCUIT COURT FOR P.G. COUNTY, MARYLAND

JOSEPH SMITH AND SONS, INC., et al. *

Plaintiffs *

vs. * CAL 92-10285

DAVIS INDUSTRIES, et al *

Defendants *

* * * * * * * * * * * * * * * * * * * * * * * *

### ANSWERS TO INTERROGATORIES

JOSEPH SMITH & SONS, INC. and R. PAUL SMITH, in answer to the Interrogatories propounded herein by Defendant, Fred G. Zehner, states as follows:

* * *

8. Identify those documents or permits that reflect authorization for Plaintiff to deposit their shredder residue in the three (3) above stated landfills.

ANSWER: See attached.

* * *

9. In reference to Paragraph 36 of the Complaint, state the factual basis for Plaintiff's allegation that Mr. Sidney Shore conspired with Fred Zehner to defraud and unlawfully interfere with Plaintiffs' business and in your answer identify the time and place such actions occurred. In addition, identify all persons who participated or witnessed such actions.

ANSWER: Upon information and belief, Sidney Shore provided the information which was used in the letters, copies of which are attached.

10. In reference to Paragraph 38 of the Complaint, state the factual basis for Plaintiff's allegation that Fred Zehner schemed or conspired to attempt to sop Plaintiff from depositing it's shredder residue at the Brown Station Landfill; specifically identifying any person(s) who participated or witnessed such actions involving Fred Zehner.

ANSWER: See attached.

11. State the factual basis supporting Plaintiffs' allegations that a letter was sent to members of the Prince George's County Council and other officials containing false and fraudulent statements including a false laboratory analysis allegedly pertaining to Plaintiffs' shredder residue; and, in your answer identify all documents involved, in whose possession they exist and identify all persons who participated or witnessed such actions.

ANSWER: See attached.

* * *

14. In reference to Paragraph 38 of the Complaint, identify the alleged test results that reflected Plaintiffs' levels at 700 parts per

million; specifically identify the test result document, the date thereof, the type of test, the testing laboratory and whether the test was based upon a request by Plaintiff for testing of Plaintiffs' materials.

ANSWER: See attached. The test was not based upon a request by the Plaintiff.

* * *

I HEREBY SWEAR AND AFFIRM under the penalties of perjury that the matters and facts contained in the foregoing Answers to Interrogatories are true, accurate and correct to the best of my personal knowledge, information and belief.

JOSEPH SMITH & SONS, INC.

s/ Michael Price
MICHAEL PRICE, Vice President

Respectfully submitted,

CAIN & WYROUGH, P.C.

s/ Richard R. Wyrough
RICHARD R. PAGE WYROUGH
14336 Old Marlboro Pike
Upper Marlboro, Maryland 20772
(301) 627-4600

* * *

## APPENDIX H

IN THE CIRCUIT COURT FOR P.G. COUNTY, MARYLAND

JOSEPH SMITH AND SONS, INC., et al. *

Plaintiffs *

vs. CAL 92-10285 *

DAVIS INDUSTRIES, et al *

Defendants *

* * * * * * * * * * * * * * * * * * * * *

OPPOSITION TO MOTION FOR SANCTIONS

JOSEPH SMITH & SONS, INC. and PAUL SMITH, by and through counsel, Richard R. Page Wyrough and the Law Offices of Cain and Wyrough, in opposition to Defendant, Fred G. Zehner's Motion for Sanctions, states as follows:

1. Defendant's counsel has moved for sanctions pursuant to rule 2-432.

* * *

6. **Those documents have been supplied to counsel for Zehner and the objections are moot.** (emphasis added)

6. [sic] With respect to the alleged deficiencies identified in the answers to Interrogatories 15, 16, 17, 19, 22 and 23, the information requested is available **in the documents supplied to counsel.** (emphasis added)

7. [sic] With respect to the demand that the answer to Interrogatory number 26 be supplemented, the answer will be supplemented when the information becomes available.

WHEREFORE, as a Motion for Sanctions is not available to the Defendant as this time; as the motion is not in proper form; and as the information demanded has been supplied, the Plaintiffs respectfully request this honorable Court to deny Defendant's Motion for Sanctions.

Respectfully submitted,

CAIN & WYROUGH, P.C.

s/ Richard R. Wyrough

RICHARD R. PAGE WYROUGH
14336 Old Marlboro Pike
Upper Marlboro, Maryland 20772
(301) 627-4600

## APPENDIX I

IN THE CIRCUIT COURT FOR P.G. COUNTY, MARYLAND

JOSEPH SMITH AND SONS, INC., et al. *

Plaintiffs *

vs. CAL 92-10285 *

DAVIS INDUSTRIES, et al *

Defendants *

* * * * * * * * * * * * * * * * * * * * * * * *

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
Motions Hearing

Upper Marlboro, Maryland
Friday, June 11, 1993

BEFORE:

THE HONORABLE WILLIAM D. MISSOURI, Associate Judge

* * *

Page H-3, lines 9-15

THE COURT: I had Mr. Thomas' motion to dismiss. I don't recall the other. But with respect to the motion to dismiss, Mr. Wyrough there is a motion pending to dismiss the amended count one.

MR. THOMAS: There is. It's my motion.

Page H-4, lines 4-12

THE COURT: Are we sure that the other party is not going to be prejudiced?

MR. THOMAS: Your Honor, I talked to him. It's Gary Stanley out of Mr. Mullenholz' office for Ettleman and Davis Industries. And he was just here observing today. He said, Doug, I'm not here to testify or make any proffers or anything else other than what you want to tell the Court.

Page H-4, lines 17-25; Page H-5, lines 1-3

THE COURT: Okay. You're here today on defendant Fred Zehner's motion for motion to compel or in the alternative?

MR. THOMAS: We're here on our motion to compel, Your Honor. It's a very simple issue before the Court. And it basically is that we have filed certain interrogatories that go back all the way to August, 1992 upon the plaintiff. And he had supplied some of the answers to those interrogatories. And some of the answers that he supplied to referred to certain documents to be attached hereto.

Page H-5, lines 16-25; Page H-6, lines 1-25; Page H-7, lines 1-25; Page H-8, lines 1-25; Page H-9, lines 1-9

(By Mr. Thomas)

Your Honor, I think it's important to note that we have not filed a motion to produce documents. We're only dealing with interrogatories so far. That's as far as we've gotten so far.

There are 12 interrogatories that have not been fully explained.

THE COURT: Would you list them for me, sir?

MR. THOMAS: Yes, sir, Your Honor.

THE COURT: Tell me what your basis of complaint is with respect to each.

MR. THOMAS: Yes, I will, Your Honor.

The first one, Your Honor, is question number eight, identify those documents or permits that reflect authorization for plaintiff to deposit their shredder residue in the three above stated landfills.

The answer we received was see attached documents. There were no attached documents to the answers, Your Honor. In the documents that were supplemented later, nothing indicated as to which questions the particular documents pertain to.

And Your Honor, in all honesty, reviewing the documents, they had very little relationship to each one of those questions. So, under the rules, certainly counsel has the right to supplement his answer with business documents kept in the ordinary course of business.

However, Rule 2-421(c) specifically states that he must do so with specificity. He must specify the answer -- from where the

answer may be of. So, basically, the rule, Your Honor, under (c) states that the burden is on him to specify which documents are answering which interrogatories. And that's all we've asked him to do, Your Honor.

THE COURT: Okay, we're going to take this one at a time. I want to maybe sure -- Mr. Wyrough, do you have any response to that?

He's talking about his interrogatory number eight, sir.

MR. WYROUGH: I've not got a response to that at this time.

THE COURT: Okay, go ahead.

MR. THOMAS: Your Honor, the next interrogatory -- and there is 12 altogether.

THE COURT: Yes, sir. I understand.

MR. THOMAS: The next one is interrogatory number nine, and it is exactly the same situation, Your Honor. It says, see attached documents. There were no attached letters that refer to the -- attached on the interrogatories.

THE COURT: Mr. Thomas, forgive me for interrupting you. I don't like to do that, but have you and Mr. Wyrough had any conversation about these things? Have you all talked to each other?

MR. THOMAS: Yes, Your Honor. We've talked. I've sent several letters to him requesting information. Nothing has been forthcoming.

THE COURT: Okay, go ahead, sir.

MR. THOMAS: Number nine, Your Honor, is exactly the same thing requesting the documents where he said see attached.

THE COURT: Okay. Yes, sir, go ahead.

MR. THOMAS: And number ten, exactly the same situation. No attached documents.

Number 11, Your Honor, the same situation.

Number 14, Your Honor, the same situation.

And question number 15, ... We received no response to that, Your Honor.

THE COURT: Okay.

Page H-11, lines 1, 8-9

THE COURT: We're on number 16.

MR. THOMAS: Your Honor, the next question interrogatory is number 17.

Page H-12, lines 3-7, 19-21

THE COURT: And what was the response to that?

MR. THOMAS: Nothing, Your Honor.

THE COURT: Okay.

MR. THOMAS: Interrogatory number 19, ....

We did not receive an answer on that, Your Honor a sufficient answer.

Interrogatory number 22, ....

Page H-13, lines 11-12, 25
(By Mr. Thomas)

We did not receive an answer.

Interrogatory number 23, Your Honor, ...

Did not receive an answer.

Page H-14, lines 1, 10-11, 12, 21-22

Interrogatory number 26, ...

Supplemental answers have not followed.

Interrogatory number 27, ...

... We did not receive an answer to that.

Page H-16, lines 8-11, 24-25; Page H-17, lines 1-11

THE COURT: I read as I was going through the file that there was a dispute about cataloging here.

Mr. Thomas, what say you about that?

(By Mr. Thomas)

But Your Honor, I'm not even dealing with that. I'm still at the interrogatory stage, and he elected in his answers in interrogatories to refer to documents and say see attached. And the rule is clear under (c). Under 2-421 that he has to specify which of those documents pertain to which answer, and he has not done that.

2-421(c), Your Honor.

THE COURT: Just had the wrong volume, sir.

Okay, Mr. Wyrough, what say you to that? That rule seems to say what he said.

Page H-18, lines 24-25; Page H-19, lines 1-11

THE COURT: Well, I'm just a country boy, but it says, a specification shall be in sufficient detail to permit the interrogating party to locate and to identify.

And that tells me you have to have some specification there. Otherwise, we get into a situation of Class Action, and I don't want to bring the movies in here, but you saw that and you saw how they buried documents there.

So, I don't want that to happen in this case. So, but I will issue a fiat. I suggest you cooperate. I don't want to do that.

Page H-20, lines 23-25; Page H-21, lines 1-9, 15-21

MR. FARRINGTON: There is some material. We are arguing with his clients on the basis that they are serious competitors. And when we argue against them and we're saying to them that they are competitors in the area of fluff and they are saying to us, oh, yeah, give me all your names of your client lists and give me all of the businesses we're going to be in, there is serious fussing.

THE COURT: Oh, I know you will be. and you consider that to be a trade secret. I understand that.

MR. THOMAS: ... They ask him simply to identify what documents is it that support or would answer these interrogatories.

Page H-22, lines 4-24

(By Mr. Thomas)

All I'm asking -- but I don't want, as he has done as to give me two stacks of documents and say see attached. And somewhere in there -- because what's going to happen -- and I've been down this

road so many times before is that there are going to be some documents later on that come up, and he will say, well, it's in that stack that you had.

And I'm saying the -- my client is going to ream me out because he's going to say, you have asked the question. Why didn't you get the answer?

THE COURT: Mr. Thomas, you will get your answer. I'm going to take Mr. Farrington's suggestion, because it ones that you asked right from the beginning. See if that will work by you are going across the street. I'm not expecting you to react as the movie Class Action did, because I know that's something I was hoping only happened in Hollywood. Obviously not.

Page H-23, lines 18-21

(By Mr. Wyrough)

We're not talking about as in Class Action boxes and boxes and boxes where it is, you know, patently -- somebody is trying to hide something. It's not even close to that.

## APPENDIX J

IN THE CIRCUIT COURT FOR P.G. COUNTY, MARYLAND

**********

CASE ASSIGNED TO JUDGE JAMES P SALMON
**********

Joseph Smith & Sons vs. Smith Case No: CAL 92-10285

* * *

DOCKET INFORMATION

| DATE: | NUMBER: | DOCKET ENTRY: |
|---|---|---|
| 06/08/92 | 001 | Complaint and Lines, FD. |
| | | * * * |
| 01/04/93 | 050 | Motion for Sanctions, Certificate and Affidavit of Counsel, and Exhibits, Filed.JC |
| | | * * * |
| 01/18/93 | 056 | Opp to Motion for Sanctions, Filed.GE |
| | | * * * |
| 01/26/93 | 059 | Order dated 012593, Judge Martin. Ordered that the Defendant's Motion for Sanctions be denied. CC mailed by court. FD.DMS |
| | | * * * |
| 03/26/93 | 073 | Motion to Compel Discovery, Request for Hearing, Points and Authorities, Certificate and Affidavit of Counsel, Exhibits. Filed.JC |
| | | * * * |
| 04/15/93 | 076 | Opp to Motion to Compel. FD.GE |

* * *

| | | |
|---|---|---|
| 06/14/93 | 089 | Daily Sheet dated 6/11/93 Judge Missouri, Defendant Fred C. Zehner Motion to Compel Discovery argued Miss Miller reporter motion not ruled on this date reset 6/30/93 for further hearing on motion, parties notified. FD. |
| 06/30/93 | 090 | Daily Sheet dated 6/30/93 Judge Missouri, continue Mr. Rogers reporter reset 8/10/93 on issue discovery before Judge Missouri, case to be specially set before a judge for trial 2 weeks, case not to be set before Judge Missouri for trial. FD. |
| 08/12/93 | 092 | Daily Sheet dated 8/10/93 Judge Missouri ... Line to be filed with answers complete, reset 8/26/94, settlement conference 9/26/94 ... |
| 10/8/93 | 100 | Scheduling Order, dated 9/29/93, ordered that discovery will be complete by 4/1/94, motions for summary judgment will be filed by 6/15/94, oral arguments and all other pending motions will be heard on 7/7/94, all motions in limine will be filed by 9/5/94, proposed voir dire will be filed by 9/12/94, jury instructions will be filed by 9/17/94, trial will begin 9/26/94, Judge Salmon, cc sent by court. FD. |

* * *

| | | |
|---|---|---|
| 1/11/94 | 106 | Daily Sheet dated 1/6/94 Judge Salmon, Defendant's Zehner's motion to compel discovery argued ... |

* * *

| | | |
|---|---|---|
| 01/31/94 | 108 | Order granting motion to compel discovery, dated 1/11/94, Judge Salmon, ordered that plaintiffs shall produce ... material pursuant to Defendant's first request for production of documents ... |
| 01/31/94 | 109 | Order dated 1/10/94, Judge Salmon, ordered ... that Plaintiff submit its supplemental answers to interrogatories propounded by defendant to counsel for defendant within fifteen days ... |

* * *

| | | |
|---|---|---|
| 06/09/94 | 129 | Suggestion of Bankruptcy. FD. (JSALMON) |

* * *

## APPENDIX K

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| In Re: | : | |
| | : | |
| Joseph Smith & Sons, Inc. | : | Case No. 94-1-2947DK |
| | : | |
| Debtor. | : | |

October 13, 1995
Upper Marlboro, Maryland

Deposition of

**ROBERT PAUL SMITH**

a witness in the above-entitled cause, was called for examination by counsel for Contaminated Soil Consultants, Inc., pursuant to notice of deposition and to agreement of counsel as to time and place, in the offices of Cain & Wyrough, ...

* * *

Page 4, lines 7-14

**EXAMINATION BY COUNSEL FOR CONTAMINATED SOIL CONSULTANTS, INC.**

BY MR. THOMAS:

Q Mr. Smith, would you state your full name and current business address for the record.

A My name is Robert Paul Smith. My business address is 2001 Kenilworth Avenue, Beaver Heights, Maryland.

Page 9, lines 12-13

A I became the general manager of all the companies.

Page 12, lines 12-14

Q So you still oversee the whole operation, you're chief executive officer; is that a fair statement?

A That's a fair statement.

Page 15, lines 17-18

THE WITNESS: ... The second closest competitor would have been Davis Industries....

Page 18, lines 17-18

... I just remember there were tow or three gentlemen from Contaminated Soils.

Page 19, lines 17-22

Q You stated you thought you met Mr. Zehner at that time. You're not positive of that; is that correct?

A I assume this is Mr. Zehner right here (indicating)?

Q This is Fred Zehner right here.

A I don't recognize him right now.

Page 20, lines 4-6

Q Do you recall ever meeting Mr. Zehner face to face?

A No.

Page 20, lines 10-13

Q Did they leave any card with you or any documents?

A I remember them leaving business cards. I usually ask for them.

Page 20, lines 16-18

Q You don't recall the names on those business cards?

A I think one of them said Zehner.

Page 21, lines 4-12

Q Any communications with them after that?

A I don't remember any.

Q Any contacts with any of their representatives or agents after that initial recollection?

A I kind of remember McPhatter coming in, who worked for them, periodically to see where we were going with our auto fluff and seeing if he couldn't broker our auto fluff into various locations, and I kind of remember him giving us prices to do that.

Page 22, lines 15-19

A Just through his involvement with Contaminated Soils.

Q Did he ever try to sell anything or act as your agent or broker?

A Not to my knowledge.

Page 23, lines 2-4

THE WITNESS: Yes. I remember he came in and wanted the ability to broker our auto fluff as waste into certain landfills.

Page 23, lines 10-15

Q And do you recall if he was specifically representing himself as an agent for CSCI?

MR. WYROUGH: Objection to the form. Go ahead and answer.

THE WITNESS: Yes. He handed me his business card and that's who he represented.

Page 33, lines 17-22; Page 34, lines 1-18

Q What was the test result of?

A It was a test result of auto fluff.

Q Was there anything damaging in that test result?

A It implied that it was damaging and when you first read it it looked damaging, but when you read it very carefully the end result was it wasn't damaging, the way I remember it. It was implied that it was a test of auto fluff that failed and the numbers had been altered, but the letters were not altered and because the letters weren't altered and they were, as I remember it, parts per billion instead of parts per million, if it had gotten to an expert they would have known that it wasn't damaging. But it was easy to miss.

Q When you say it was implied, how do you mean implied?

A Most everybody knows that PCBs fail the test at 50, 50 parts per million. Most lab reports on auto fluff are reported in parts per million, so anybody who is used to typically looking at a report they see the number as above or below 50, they don't look any farther than that. I remember this number being well, well, well above 50

and as I recall it it was a long time before somebody pointed out that somebody didn't change the letters either.

Page 35, lines 10-15

Q Now why do you believe that someone from CSCI had something to do with that second letter, the Alex Williams letter?

A Because the people from CSCI delivered to Mr. Taylor at Anne Arundel County a package trying to sell the benefits of using Davis' auto fluff as daily cover and gave a complete package as to why it was better, and as part of that package that lab report in its unaltered state was part of that package.

Page 37, lines 7-14

Q Which means that it wouldn't have been detrimental to Joseph Smith & Sons if in fact that had been their test result?

A That's the way I remember it.

Q And is it your testimony that your understanding was that that was presented to Mr. Taylor in Anne Arundel County in its unaltered state?

A Correct.

Page 38, lines 2-11

Q How do you know that?

A Because Mr. Taylor called me up and said he had a package that was delivered from Contaminated Soils showing the benefits of their auto fluff and if I would like to take a look at it he'd be glad to show it to me.

Q And did you in fact take him up on that offer?

A I in fact took him up on that offer.

Q And what did he provide to you?

A The package that was given to him by Contaminated Soils.

Page 41, lines 1-19

Q What was the substance of that conversation?

A When I read through the packet and saw the test result I called him up because I had given him a copy of the Prince George's County Alex Williams letter and the lab test because our style of doing business is we prefer to tell everybody anything we know so that nobody ever gets surprised by anything that goes on in the marketplace. So he had already seen and had a copy of the letter to my knowledge. I think I said, guess what's in this packet that came from Contaminated Soils. He said, I don't know. I said, the lab report that was attached to that Prince George's County Alex

Williams letter in its unaltered state, with every number other than the altered numbers right down to the part per billion, exactly the same. His comment was, unbelievable.

Q This test result, as you stated earlier, you believe was a Davis Industries test result?

A It was checked out to be a Davis Industries test result.

Page 49, lines 11-22; Page 50, lines 1-10

Q During this period of time were you concerned that CSCI was becoming a competitor of Joseph Smith & Sons?

A Absolutely not.

Q Did you feel that they were any threat to your volume of business at that time?

A Absolutely not. They're not in the same business as I am.

Q What was it that they were trying to get into Anne Arundel County Landfill then?

A They were trying to move all the fluff into Anne Arundel County Landfill.

Q And were you sending auto fluff into Anne Arundel County Landfill at the time?

A Yes.

Q Would you not characterize that as a competitor?

A No.

Q Why not?

A Because I could have gone to any other number of landfills, okay, if Anne Arundel didn't want it. They product is something that Anne Arundel County wanted and needed and so did many others.

Page 69, lines 21-22; Page 70, line 1

Q Did you ever consider dropping the litigation against Mr. Zehner prior to the filing of bankruptcy?

A No.

Page 74, lines 10-14

(By Mr. Thomas)

Did Mr. McPhatter ever ask you if he could market your cover material, to the best of your recollection?

A I don't ever remember McPhatter coming in and asking us to market our material as cover anywhere.

Page 74, lines 18-22; Page 75, line 1

Q Did he ever try to get you approved at any of the landfills?

A As cover or for disposal?

Q Either one.

A I think he tried to get us approved somewhere for disposal and gave us a price for disposal.

Page 75, lines 16-22; Page 76, lines 1-3

Q Was Conservit ever a competitor of your's, of Joseph Smith's?

A In what area?

Q I cover material?

A The only time we ever bumped into Conservit on cover material was when Howard County put out a solicitation for -- I think the solicitation read auto fluff for daily cover. They tied it with a bid for the sale of metals from the landfill. They bid on that; we bid on that; they were the successful bidder.

* * *

**APPENDIX L**
(References to Bifurcation)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MARYLAND
(Southern Division)

In re: :
:
JOSEPH SMITH & SONS, INC. :
Case No. 94-1-2947 DK (11)

and

R. PAUL SMITH :
Case No. 94-1-2948DK(11) :
:
Debtors. :
:

October 17, 1995
U.S. Bankruptcy Court
Greenbelt, Maryland

H E A R I N G

* * *

Page 60, lines 18-20

MR. THOMAS: Your Honor, pursuant to the agreement that we have with respect to the damages, I have no further questions for Mr. Zehner at this time.

* * *

Page 88, lines 19-22

THE COURT: This again is subject to the agreement and stipulation on damages?

MR. WYROUGH: Yes, it is, Your Honor.

MR. THOMAS: Yes, Your Honor.

* * *

Page 89, lines 8-13

THE COURT: Ladies and gentlemen, we've had a bench conference regarding the legal position taken by both parties with respect to the issue of whether or not sufficient evidence is in the record to support an abuse of process claim under the jurisprudence of Maryland, at least at the state in which we find it.

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